

1 JAMES L. LOPES (No. 63678)
2 CEIDE ZAPPARONI (No. 200708)
3 CARA J. FREY (No. 215090)
4 HOWARD, RICE, NEMEROVSKI, CANADY,
5 FALK & RABKIN
6 A Professional Corporation
7 Three Embarcadero Center, 7th Floor
8 San Francisco, California 94111-4065
9 Telephone: 415/434-1600
10 Facsimile: 415/217-5910

50-295/323

11 Attorneys for Debtor and Debtor in Possession
12 PACIFIC GAS AND ELECTRIC COMPANY

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 In re

17 PACIFIC GAS AND ELECTRIC
18 COMPANY, a California corporation,

19 Debtor.

20 Federal I.D. No. 94-0742640

Case No. 01-30923 DM

Chapter 11 Case

Date: November 14, 2002

Time: 9:30 a.m.

Place: 235 Pine Street, 22nd Floor
San Francisco, California

Judge: Hon. Dennis Montali

21 DEBTOR'S NOTICE OF MOTION AND MOTION FOR ORDER
22 AUTHORIZING DEBTOR TO PAY REFUNDS TO CUSTOMERS FOR PRE- AND
23 POST-PETITION ELECTRIC TARIFF RULE 20-B POLE REMOVAL COSTS;
24 SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

25 [DECLARATION OF ROCCO COLICCHIA IN SUPPORT
26 HEREOF FILED SEPARATELY]

27 A001 Add: Rick Ogden Center
28

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 14, 2002, at 9:30 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali, located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric Company, the debtor and debtor in possession in the above-captioned Chapter 11 case (“PG&E” or the “Debtor”), will and hereby does move the Court for entry of an order authorizing PG&E to refund to customers certain pole removal costs assessed under the California Public Utilities Commission (“CPUC”) Electric Tariff Rule 20—Replacement of Overhead With Underground Electric Facilities (“Rule 20”), in accordance with the CPUC’s March 6, 2002 Resolution E-3757, as modified by the June 6, 2002 Order Modifying Resolution E-3757 And Denying Rehearing Of The Resolution As Modified (the “Motion”).

This Motion is made pursuant to Section 105(a) of the United States Bankruptcy Code (11 U.S.C. §105(a)) and is based on the facts and law set forth herein (including the accompanying Memorandum of Points and Authorities beginning on the next page), the Declaration of Rocco Colicchia in Support of Motion for Order Authorizing Debtor to Pay Refunds to Customers for Tariff Rule 20-B Removal Costs filed concurrently herewith, the record of this case, and any evidence presented at or prior to the hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9014-1(c)(2) of the Bankruptcy Local Rules for the Northern District of California, any written opposition to the Motion and the relief requested therein must be filed with the Bankruptcy Court and served upon appropriate parties (including counsel for PG&E, the Office of the United States Trustee and the Official Committee of Unsecured Creditors) at least five (5) days prior to the scheduled hearing date. If there is no timely objection to the requested relief, the Court may enter an order granting such relief without further hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Pacific Gas and Electric Company ("PG&E" or the "Debtor") hereby moves this
4 Court for an order authorizing PG&E to pay refunds to customers of certain pole removal
5 costs assessed under the California Public Utilities Commission ("CPUC") Electric Tariff
6 Rule 20—Replacement of Overhead With Underground Electric Facilities ("Rule 20") in
7 accordance with the California Public Utilities Commission's ("CPUC") March 6, 2002
8 Resolution E-3757, as modified by the June 6, 2002 Order Modifying Resolution E-3757
9 And Denying Rehearing Of The Resolution As Modified (collectively, the "Resolution"), in
10 an aggregate amount \$3,509,644.13 (including interest pursuant to the Resolution).

11 **I.**

12 **FACTUAL BACKGROUND¹**

13 An ongoing PG&E project is the conversion of electric service from overhead to
14 underground facilities. This involves removing old overhead facilities, including poles,
15 wires, transformers, and switches, and installing new underground electric service facilities.
16 Under Rule 20-B, PG&E will replace its existing overhead electric facilities with
17 underground electric facilities along public streets and roads or other locations mutually
18 agreed upon when requested by an applicant if a number of conditions are met. Among
19 these Rule 20-B conditions, applicants must agree to transfer ownership of facilities installed
20 by the applicant such as pads, vaults, conduits, and substructures, in good condition, to
21 PG&E and must pay a nonrefundable sum equal to the excess, if any, of the estimated costs
22 of completing the underground system and building a new equivalent overhead system. An
23 additional Rule 20-B condition is that the area to be undergrounded must include both sides
24 of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead
25

26
27 ¹The evidentiary basis and support for the facts set forth in this Motion are contained in
28 the Declaration of Rocco Colicchia in support hereof filed concurrently herewith (the
"Colicchia Declaration").

1 communication and electric distribution facilities within the area must be removed.²

2 From 1968 to approximately 1995, PG&E paid for the costs of removing these
3 overhead facilities, including the poles. Beginning in approximately 1995, PG&E reviewed
4 Rule 20-B and determined that the Rule authorized PG&E to charge customers for the pole
5 removal costs when converting to underground electric service. Accordingly, at that time,
6 PG&E began charging customers for these costs.

7 On March 6, 2002, the CPUC issued the Resolution, ordering electric utilities to
8 charge removal costs, including pole removal costs, to their underground conversion
9 program budgeted allocations, rather than to their customers.³ The Resolution orders all
10 charges for pole, line, and equipment removal from customers requesting undergrounding of
11 overhead electric service to be identified and returned to such customers with interest within
12 180 days of the effective date of the Resolution (March 6, 2002).⁴ See Resolution at 10.
13 The CPUC ordered that interest payments be based on the commercial paper rate, and should
14 begin from the time the customers affected by Tariff Rule 20-B service started paying for the
15 removal of overhead poles, lines and facilities. See Resolution at 10. Once the CPUC
16 issued the Resolution, PG&E stopped charging customers for such pole removal costs.

17 In accordance with the Resolution, PG&E currently owes 230 refunds for Rule
18 20-B pole removal costs from 1995 to April 6, 2001, totaling \$3,509,644.13 (including
19 interest pursuant to the Resolution).⁵ PG&E also owes 52 refunds with respect to the post-

21 ²Rule 20 is comprised of three subsections. Under Rule 20-A, PG&E charges
22 ratepayers for the undergrounding of electric facilities where such undergrounding has been
23 determined to be in the general public interest. For example, ratepayers fund
24 undergrounding under Rule 20-A if it is determined that the street or road or right-of-way is
extensively used by the general public and carries a heavy volume of pedestrian or vehicular
traffic. Rule 20-C provides for undergrounding of electric facilities in those areas to which
Rule 20-A or 20-B does not apply.

25 ³The CPUC's modification dated June 6, 2002 denied PG&E's application for
rehearing and made a few non-substantive textual changes.

26 ⁴PG&E obtained an extension of the 180 days and currently has until January 2, 2003
to provide refunds to Rule 20-B customers who paid pole removal costs.

27 ⁵Attached to the Colicchia Declaration as Exhibit C is a list of all customers who
28 PG&E believes are owed a Rule 20-B refund for pre-petition pole removal costs. The
Exhibit sets forth, in alphabetical order, the customer name, the order number, the payment

petition period, i.e. from the petition date until immediately after the Resolution when PG&E stopped charging customers for pole removal costs. The amount PG&E owes for post-petition pole removal refunds is \$700,169.05, and PG&E intends to refund this amount to customers in the ordinary course of business.

II.

DISCUSSION

A. This Court Should Authorize The Debtor to Refund Customers For Pre-Petition Tariff Rule 20-B Pole Removal Costs Pursuant To Section 105(a) Of The Bankruptcy Code And The Court's Inherent Powers.

PG&E requests that this Court authorize PG&E to refund customers for pre-petition Rule 20-B pole removal costs pursuant to Section 105(a) of the Bankruptcy Code and the Court's inherent powers. Section 105 authorizes this Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The purpose of Section 105 is "to assure the bankruptcy court's power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2 Lawrence P. King, Collier on Bankruptcy, ¶105.01 at 105-06 (15th ed. Rev. 2000).

Although payment of pre-petition claims prior to confirmation of a plan in a Chapter 11 case is generally not allowed, Section 105(a) confers the power to authorize payments irrespective of priorities where circumstances so warrant. See, e.g., Crafts Precision Indus., Inc. v. U. S. Healthcare, Inc. (In re Crafts Precision Indus., Inc.), 244 B.R. 178, 183 (B.A.P. 1st Cir. 2000) (affirming authorization of vacation payments "pursuant to § 105, irrespective of them being non-priority obligations"); In re Equalnet Communications Corp., 258 B.R. 368, 369 (Bankr. S.D. Tex. 2000) (exceptions to general rule against pre-confirmation payment of pre-petition claims "arise primarily out of common sense and the presence of a legal or factual inevitability of payment"). For instance, pursuant to Section

amount, the interest on the payment amount based on the commercial paper rate applicable at the relevant times, the total refund amount PG&E believes is owed to such customers, and the date that PG&E received payment from such customers.

1 105(a), courts have authorized immediate redemption of pre-petition retail coupons, the
2 honoring of credit card debits, credits or chargebacks by retail stores, and the issuance of
3 billing credits to retail customers in connection with pre-petition telephone services. See id.
4 at 369. Such claims are allowed to aid reorganization, prevent the loss of the Debtor's
5 customer base, and to prevent "potential harm to . . . 'silent' or unrepresented
6 constituencies" such as the small businesses that comprise most of the potential Rule 20-B
7 refund recipients. Id. at 370 n.4.

8 The logic of these cases applies with particular force in the current context.
9 Pursuant to the Resolution, the CPUC ordered that all charges for pole, line, and equipment
10 removal from customers requesting undergrounding of overhead electric service must be
11 identified and returned to such customers with interest within 180 days of the effective date
12 of the Resolution (March 6, 2002).⁶ The Debtor's inability to refund amounts to these
13 customers would prevent the Debtor from complying with the Resolution. Moreover, the
14 authorization sought by PG&E would benefit the estate by reducing ongoing interest costs.

15 Additionally, the amount of money the Debtor requests to refund (i.e.
16 approximately \$3.5 million) represents a very small percentage of the Debtor's total assets.
17 The Debtor is solvent and the small amount of money that would be paid would have no
18 effect on the Debtor's ability to reorganize.

19 Finally, this Court has authorized the payment of a number of pre-petition
20 refunds in this case, including service deposits (see Order Granting Debtor's Emergency
21 Motion For Authority To Refund Pre-Petition Security Deposits To Residential And Non-
22 Residential Customers filed on April 10, 2001 (Docket No. 62)) and main line extension
23 payments (see Order Authorizing Debtor To (1) Assume Executory Main Line Extension
24 Contracts and (2) Pay Outstanding Amounts Due Under Non-Executory Main Line
25 Extension Contracts, filed on March 25 2002 (Docket No. 5547)), in each case in amounts

26
27 ⁶As indicated previously, PG&E has obtained an extension of the 180 days and
28 currently has until January 2, 2003 to provide refunds to Rule 20-B customers who paid pole
removal costs.

1 far exceeding the \$3,509,644.13 that the Debtor seeks to refund in connection with this
2 Motion.

3 In sum, regulatory and equitable considerations mitigate in favor of authorizing
4 the Debtor to refund customers for Rule 20-B pole removal costs. The Debtor therefore
5 requests authority to refund amounts to customers for undergrounding of overhead electric
6 service for all charges for pole, line, and equipment removal from 1995 to April 6, 2001.⁷

7 III.

8 CONCLUSION

9 For the foregoing reasons, PG&E respectfully requests that this Court make and
10 enter an order authorizing PG&E to refund customers for pre-petition and post-petition
11 Tariff Rule 20-B pole removal costs in accordance with the Resolution.

12 DATED: October 21, 2002.

13 HOWARD, RICE, NEMEROVSKI, CANADY,
14 FALK & RABKIN
A Professional Corporation

15 By: 

16 CEIDE ZAPPARONI

17 Attorneys for Debtor and Debtor in Possession
18 PACIFIC GAS AND ELECTRIC COMPANY

19 WD 102102/1-1419913/cec/1020647/v6
20
21
22
23
24
25

26
27 ⁷Some of the refund recipients have filed claims and others have not. For
28 administrative ease and in order to resolve the refund issue entirely and comply fully with
the CPUC Resolution, PG&E has made no distinction between those refund recipients who
have filed claims and those who have not.